No. 14836

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs

ELMER G. COFFEY and MRS. ELMER G. COFFEY, husband and wife,
Appellees.

No. 14836

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE APPELLEES
ELMER G. COFFEY & MRS. ELMER G. COFFEY

POWELL & LONEY
Attorneys for Appellants

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TEXTS

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STATEMENT OF PLEADINGS

Appellees, Mr. and Mrs. Elmer G. Coffey, brought this action against the United States of America seeking a recovery for the injuries sustained by Appellee Elmer G. Coffey under the authority of the Federal Tort Claims Act, 28 U.S.C. 1346(b). This was alleged in paragraph 1 of the complaint (R.3). Appellee's injury was caused by the negligent actions of the government employees while acting within the scope of their employment and under such circumstances that a private person would have been liable under the laws of the State of Washington (R.7, 8).

The District Court for the Eastern District of Washington, Southern Division, being the district in which appellees reside (R. 3) and in which the accident occurred (R. 5) entered judgment for appellees (R. 16) awarding them a sum of money to compensate them for the injuries to Appellee Elmer G. Coffey. Appellant did not complain about the amount of the award (App. Br. 14, 15), but questioned the liability. Accordingly an appeal was entered and this court has jurisdiction to review the action.

COUNTER STATEMENT OF THE CASE

A. RESTATEMENT OF THE EVIDENCE.

Appellant in its brief, pages 3 through 10, set forth a summary of the evidence presented in the District Court.

The manner of presentation of certain facts, however, tend to distort the actual evidence heard by the trial judge. It is hoped that a brief review of the evidence will assist this honorable court in evaluating this cause.

During World War II the Department of the Navy owned and operated a Naval Air Training Station at Pasco, Washington (R. 189). In November 1943, this base was converted from a training field to a practice bombing base (R. 190). An examination of the two maps introduced in evidence (Ex. 8 and 15) indicates that although the Pasco Air Station is in Franklin County, Washington, it is just across the Columbia River from Richland, Washington, location of the Hanford Works Plant; the center of the Columbia River being the dividing line between Benton and Franklin County. All of the events involved in this trial took place in Benton County, Washington. There was only one bombing target range used in Benton County, Washington, (R. 200) and as shown by Exhibit 8, this was situate between Benton City and Richland, Washington. Beyond a shadow of a doubt, the evidence (R. 71-3, 87-8, 103-7, 173, 216-7) discloses that military personnel used a Mark 19, 13 pound lead practice bomb on this range between November 1943 and the end of the "shooting war" (R. 204).

The offending object which caused the injury is a bomb designated by the military as a Mark 19 A & N 13

pound practice bomb (R. 157) It is a cylindrical object approximately 12 inches long made of lead with a hole running through the center. Exhibits 1, 2, 9, 10 and 11 are all bombs that have been used and dropped (R. 65, 68-9, 70, 107, 181, 184). Exhibit 12 is a specimen of the bomb before use. As shown by the evidence this bomb has peculiar characteristics:

(1) It is constructed in such a way that when it is used the tail fins drop off (R. 176).

(2) Unless the bomb lands in just the right position, it will not explode (R. 172-3).

(3) The hole running through the center is open on both ends (Exhibit 12) and upon being dropped, rocks or dirt will lodge in it (Exhibit 2).

(4) Only a portion of the bombs bear any markings (R. 180).

(5) After being used, the bomb appears to be a lead sinker or lead conduit (R. 39, 137) and its appearance completely belies the fact that it contains an explosive charge.

These characteristics, coupled with the fact that the bombs were used and left in a farm area far from the bombing range (Exhibit 8), produced the result which would be expected. Appellee Coffey, attempting to make use of the lead object, was injured by the hidden explosive charge (R. 135).

B. CERTAIN STATEMENTS OF FACT MADE BY APPELLANT IN ITS BRIEF ARE NOT SUPPORTED BY THE EVIDENCE.

1. The government refers to the gulley where the bombs were found as being surrounded by rough, rocky and hilly terrain (App. Br. 3). Actually, as shown by Exhibits 3, 4, and 5, there are rolling hills and the gulley is rather small in both width and length with pasture land on both sides (R. 128-132).

2. Counsel assert that Albert Osborne, one of the witnesses, knew about the naval bombing ranges and that the navy had posted "KEEP OFF" signs near these ranges (App. Br. 4). The record (R. 47-8, 52) would indicate that Mr. Osborne was talking about the Pasco Navy Air Base and that the keep off signs that he mentioned had to do with the fences and restrictions around the Pasco Naval Flying Field. He specifically refers to them as airplane landing and take-off areas (R. 48). He further stated that he knew about the navy dropping bombs in the Spokane area (R. 48). But as the court points out, the area Mr. Osborne was talking about was a long way from the Pasco, Richland, Benton City area (R. 52).

3. The sweeping statement is made that either Mr. Osborne or Appellee Coffey knew about bombing ranges in the general area or the possibility of bombs in the area (App. Br. 4, 5). The only evidence in the record relates

to the knowledge of a bombing range at Zillah (R. 52) and a bombing range in the Spokane area (R. 48). Undoubtedly, the records of the Department of the Army and the Department of the Navy will disclose that these areas are many many miles from the place in question.

4. Counsel also make a point of the fact that these practice bombs were similar in form to the "bomb or dud" which was kept by Mr. Coffey (App. Br. 4). The record will show that the "bomb or dud" under discussion was a 60 millimeter H. E. mortar round (R. 225). The bombs involved in this case (Exhibits 1, 2, 9, 10 and 11) do not in any way resemble this mortar shell.

5. The government refers to the testimony of Mr. Coffey that the lead object had to be cleaned before being put in the melting pot or a "small explosion" would result (App. Br. 6, 38). Mr. Coffey was explaining what would happen if any dirty or foreign material were placed in a pot of melting lead (R. 133-4). This would cause the pot to bubble up or explode with possible injuries to those nearby. Such a possibility however, is an entirely different problem than the explosion created by a live unexploded practice bomb. It is far from the danger created by placing dirt in a pot of melted lead.

6. The statement is made that this type of practice bomb is used only in horizontal bombing (App. Br. 7). It is believed that the evidence does not support this con-

clusion. The only testimony counsel refers to in the record (R. 157, 162) concerns the government booklet describing the uses for this bomb. Under the evidence of Sgt. McCammon, James Dixon, and even Chief Warrant Officer Dickey, these bombs were used on the target range near Richland, Washington, which target range was only for skip bombing or dive bombing practice (R. 71, 73, 216-217, 87-88, 107, 108, 173, 175, 193). Captain Smith's testimony as to its use must be tempered by his explanation that he had never seen this bomb until the trial (R. 205).

7. The statement is also made that the bombing area in Benton County was enclosed by fence and warning signs were posted every 200 feet (App. Br. 7). Captain Smith's testimony (R. 200) indicates that the Captain wasn't familiar with the interval of posting and that there was only one sign that he knew about which he had seen while driving by. There was no other evidence in the record, although it was readily available to the appellant, showing any other precautions taken.

8. The government asserts that no violation of the regulations prohibiting the dropping of ordnance in an unapproved area was ever reported to naval authorities (App. Br. 8). The only evidence on this subject was Captain Smith's statement that he had never heard of any violation (R. 199).

9. Appellant suggests that Mr. McKnight found these practice bombs in a different area than the offending bomb (App. Br. 9, 20). An examination of the testimony, together with Exhibits 3, 4 and 5, conclusively shows that all of the bombs were found in the same place (R. 23, 40, 103) (Ex. 8).

10. Appellant also states that the testimony concerning the Osborne bombs and those found by McKnight was different and further that the markings on the bombs could have resulted in a way other than having been dropped by the military (App. Br. 10). The testimony shows that all of the bombs were found under the same circumstances and had the same general appearance. They were all covered partially by dirt (R. 107, 24). Sgt. McCammon ventured that the markings on the bombs *could* have been made by someone dragging them across the ground (R. 65) an the other expert, Chief Dickey, testified that the ends *could* have been plugged by water forcing rocks in the openings (R. 185). These suggestions weren't even taken seriously by the experts themselves, much less by the court (R. 186). It is hard to visualize a person dragging such a bomb across the ground. Chief Dickey's' explanation stretches the imagination beyond normal limits. These government experts were grasping at straws. In the words of Chief Dickey: "A. Yes, I could say with reasonable certainty that they were dropped

from an aircraft." (R. 184). No place in the record can appellant point to any evidence which permits even an unreasonable inference that the bombs were placed in the spot where they were found by other than military aircraft engaged in practice missions. No such suggestion was made to the lower court by the counsel who tried the case, and for the first time on appeal, counsel for the United States remarks that the bombs might have been dropped by National Guardsmen. The record is devoid of support for this comment.

ARGUMENT

The issue in this case revolves around the right of the United States Government acting through its military personnel to drop a harmless appearing lead object upon private property that had never been a bombing range and then to disclaim any responsibility for injuries sustained by a person using the lead object in a normal manner. It is undisputed that only an expert would know of the hidden explosive contained in the piece of lead.

I. THE EVIDENCE INTRODUCED ESTABLISHES WITHOUT QUESTION THE NEGLIGENCE OF THE GOVERNMENT AND APPELLEE'S RESULTING INJURIES.

The United States owned and controlled certain Mark 19 13 pound practice bombs made of lead and exclusively used for practice bombing in the training of military

personnel (R. 155-7). These bombs were under the complete custody of the United States Government and were disbursed only to its proper authorized agents for such use (R. 174). It was further proved there was only one bombing range for use by military personnel in Benton County, Washington, and that was approximately 10 miles from the scene of this occurrence (Ex. 8). This bombing range was used only for the purpose of skip and dive bombing by naval pilots stationed at the Pasco Naval Air Station (R. 192). By the far greater weight of the evidence these 13 pound practice bombs were used on the range in Benton County, and, as would be expected, there were many cases of near miss by the naval pilots resulting in the depositing of the objects outside this bombing range (R. 71-3, 88, 173, 216-7). For these locations outside the range, attention is invited to Exhibit 8 as it was marked by the witnesses (R. 73, 88). Further, the undisputed evidence disclosed that these bombs were dropped by the military in a gully near Benton City, Washington (R. 61, 103-4).

The government's evidence proved that by the very nature of the construction of the bombs, when used the tail fins would drop off (R. 172). Unless they landed in exactly the right position the charge would not be detonated (R. 173). After having dropped they would become a harmless looking object in the nature of a piece of lead

conduit or sinker without tail fins and without any warning signs (Ex. 1, 2, 9, 10 and 11). This particular salvo lay scattered in the gulley until they were discovered by the brothers-in-law of Mr. Elmer Coffey. At the end of the war the government ceased to use the target bombing range. The record contains no evidence of any effort made on the part of the United States or its employees to clean up the bombing range, or to warn the public of the possibility of live bombs in the area. No attempt was made to find these bombs dropped near Benton City, nor was any attempt made to warn the people that they had been dropped and to beware such harmless looking objects. Thus it was that the appellee, while cleaning this piece of lead, sustained a severe and disabling injury.

The three experts who testified at the trial, Sgt. McCammon, Captain Smith and Chief Warrant Officer Dickey, all agreed that the bombs were dropped there by aircraft (R. 70, 184, 226). The only dispute in the testimony was whether it was army or naval aircraft. The evidence preponderates in favor of the naval aircraft. The government doesn't object to the Finding of Fact VII that the bomb was used exclusively by the Department of the Navy and the Department of the Army, nor is there any evidence by which it could dispute this fact.

The evidence admits only two possibilities, one of which is so remote as not to merit consideration. The only

probability is that the government military aircraft dropped the bombs while engaging in practice missions. A highly unlikely possibility is that some third person placed the bomb there, but in the testimony of Chief Dickey, it would have been necessary that he not only place them there, but sit upon them as well.

As the court said in *Gas Service Co. v. Hunt,* 183 F. (2d) 417, 421:

> ". . . the origin of the fire . . . could be shown by facts and circumstances from which the inference could reasonably be drawn, and it was not necessary that the evidence be so strong as to exclude every other possible source of the fire . . ."

This is not the same problem that was raised in *Westland Oil Company v. Firestone,* 143 F. (2d) 326, 331, where the court said:

> "Where evidence is equally consistent with two opposing hypothesis, it is without probative force and tends to support neither."

The evidence in this case was of the highest grade that could have been offered under the peculiar problem involved. At stated by the text writers in 20 Am. Jur. 258:

> "The competence of circumstantial evidence is not open to question . . ."
>
> ". . . When necessity for resort to circumstantial evidence arises either from the nature of the inquiry or

the failure of direct proof, considerable latitude is allowed in the reception of circumstantial evidence. No evidence should be excluded of any fact or circumstances connected with the principal transaction and dispute from which an inference as to the truth of a disputed fact can reasonably be made.

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"The modern doctrine is extremely liberal in the admission of any circumstances which may throw light upon the matter being investigated."

The court said in *Brucker v. Matsen*, 18 Wn. (2d) 375, 382, 139 P. (2d) 276.

"We will infer a consequence from an established circumstance. We will not infer a circumstance when no more than a possibility is shown."

See also *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807.

Mathis v. Granger Brick and Tile Co., 85 Wash. 634, 149 Pac. 3, involved a similar problem which the court handled as follows:

"and that while there is no direct testimony concerning the manner in which these caps found their way to the place where the boys obtained them, it was a reasonable and natural inference which the jury would be warranted in drawing from the facts proven, that they came there as a result of the work which was going on . . . and through the agency of the men operating the drill."

In *Gardner v. Seymour*, 27 Wn. (2d) 802, 180 P. (2d) 564, it was held that where there are two consistent

theories and one of them would obsolve the defendant while the other would hold him negligent, the jury will not be allowed to speculate, but upon a showing that it could not reasonably have happened in any other way, the inference is legitimate.

As further explained by the text writers in 20 Am. Jur. 169, the courts have used the phraseology, "inference upon inference" as merely a way of disposing of evidence which is regarded as too remote. The text writer points out that the real meaning of the decisions is that they won't allow an inference to be drawn from uncertain or speculative evidence when the inference raised is merely conjecture or possibility and as stated:

> "It is further clear that many courts while recognizing that an inference upon an inference should not be allowed when the fact sought to be established is capable of more satisfactory proof by direct evidence within the power of the party assuming the burden of proof, or when the reasonable necessities of the case in the interest of justice do not require that one inference be based upon another inference, have nevertheless reputiated any intention of adhereing to a general rule prohibiting an inference upon an inference."

Here the evidence permits of only one inference, namely that the United States military personnel dropped these bombs in the gulley while practicing. As a sidelight, neither the House of Representatives, the Senate nor the Secretary of the Army was troubled by the inference

problem. During the 84th Congress, Private Law 389, chapter 727, 1st section S.476 was passed for the relief of Harold Swarthouth and L. R. Swarthouth. House Report No. 1143, and Senate Report No. 679, disclosed that a boy had been injured as a result of a bomb found near an abandoned farmhouse not in an army practice area. The report stated as follows:

> "The Department of the Army reports that the three bombs mentioned were not found by the Hickey's within an Army practice area. Neither is there anything in the army's records to show how the bombs came to be located near this abandoned farmhouse where they were found, nor who placed them there. Notwithstanding this, the type of bomb indicates they were dropped by members of the United States Army Corps. That they were found near an abandoned house (a likely target for practicing airmen), together with the fact that the noses of the bombs were crushed and broken open indicates these bombs were dropped from one or more airplanes."

The committee reports acknowledge that the activity being carried on by the government is ultra-hazardous in that it "necessarily involves a risk of serious harm to the person of others . . . "

Under the authorities and the evidence, the most reasonable and permissible inference to be drawn is that the United States Government dropped these bombs while engaging in practice bombing activities and that the bombs were dropped on property other than a government reservation in violation of the regulations (R. 198).

II. THE DOCTRINE OF RES IPSA LOQUITUR DOES APPLY TO THESE FACTS.

It was negligence for the United States to drop their practice bombs in this area. More especially considering the admitted facts that such a bomb would very likely not explode, that its tail fins would fall off, that no warning of its dangerous nature was evident, and that it would appear to be a harmless piece of lead conduit or sinker. Without question the law imposes upon the government the duty to exercise the highest degree of care in pursuing this activity. *Ford v. U. S.*, 200 F. (2d) 272, 275 (C. A. 10).

> "Ordinarily persons having dangerous explosives in their possession and control are required to exercise the highest degree of care not to injure others . . . "

In *Meara v. United States*, 119 F. Supp. 662, 664, there was no direct testimony showing how government explosives were placed where they were found. The opinion, quoting from *Fourseam Coal Corp. v. Hatfield*, 279 Ky. 132, 130 S. W. (2d) 73, holds that the owner of on explosive "is required to exert the highest degree of care . . . and that duty never ceases . . . "

This is the rule in Washington. *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 108 Pac. 140; *Mathis v. Granger Brick & Tile Co.*, 85 Wash. 634, 149 Pac. 3; *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807; *Boggus v. King County*, 150 Wash. 578, 274 Pac. 198.

The doctrine of res ipsa loquitur has been defined as "a common sense appraisal of the probative value of circumstantial evidence." *George Foltis, Inc. v. N. Y. City,* 287 N. Y. 108, 115, 38 N. E. (2d) 455, 153 A.L.R. 1122. The court further said:

> " . . . In the administration of the law we must be satisfied with proof which leads to a conclusion with probable certainty where absolute logical certainty is impossible."

The U. S. Supreme Court has described the doctrine:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference;"

Sweeney v. Erving, 228 U. S. 223, 240, 33 S. Ct. 416.

This rule prevails in Washington. *Singer v. Metz Co.,* 107 Wash. 562, 567, 182 Pac. 614, 186 Pac. 327; *Genero v. Ewing,* 176 Wash. 78, 82, 28 P. (2d) 116, *Briglio v. Holt & Jeffery,* 85 Wash. 155, 159, 147 Pac. 877; *Kolbe v. Pacific Market Delivery & Transfer,* 130 Wash. 302, 305, 226 Pac. 1021; *Pacific Coast Ry. Co. v. American Mail Line,* 25 Wn. (2d) 809, 818, 172 P. (2d) 226.

As stated by the writer in 13 Wash. L. R. 215, 220:

> "The prerequisites to the application of the doctrine, then are: (1) that the circumstances be such as to logically allow a presumption of negligence; and (2) that the circumstances suggest superior knowledge or opportunity for explanation on the part of the party charged."

Turning to the evidence before the court, is it reasonable to assume that the government was negligent in dropping these practice bombs in such an area, outside an authorized target range. Appellees believe that the undisputed facts are much stronger. The only conclusion to be drawn is that the government was negligent. The government was engaged in an ultra-hazardous activity. It was charged with the knowledge that these objects after use would not remotely resemble a bomb. The objects were dropped at an unauthorized location, and the government failed to issue any warnings, post any signs or carry out any clean up activities.

No attempt was made by the government to explain or introduce evidence to show why the bombs were dropped there. This information was within the knowledge of appellant and not appellees. No government records were introduced to show the distribution of these bombs. The only evidence offered was the testimony of Captain Smith who stated that although he was commander of the Pasco Naval Base until August, 1944, he never had seen a bomb of this type and didn't know they were used (R. 205). The last year of the war Captain Smith was away from the Pasco base (R. 203). The testimony of two government ordnance men (R. 71, 173) and a civilian (R. 87) proved that many of these same bombs were on and around the naval target range, but

the government still concludes the bombs weren't used at the Pasco Naval Base.

Appellant points to the trial court's remark about being "puzzled" and "guessing." Actually the only cause of this puzzlement was the unreconcilable testimony of Captain Smith about the use of these bombs at Pasco in the face of the other witnesses who found them all over and around the Naval target range. As the Court remarked however, it isn't necessasy by the very nature of the case to pinpoint the service which actually dropped them. It was only the Army and Navy that used these bombs.

The evidence presented calls for the use of the doctrine of *res ipsa loquitur*. The record is clear and requires no speculation or conjecture. It calls for an explanation by the government and the government is silent.

III. THERE IS NO BASIS FOR HOLDING THAT THE GOVERNMENT EXERCISED DUE CARE.

Measuring the government's actions in light of this hazardous activity, the standard of care used was certainly below that required by an individual.

There is no rule of law which would allow appellant to be shielded by the landowner's duty. The relationship between the landowner and the Osbornes can furnish no immunity to the government. It had no right to deposit

explosives on this land and was a stranger to this landowner.

Likewise having dropped the bombs there, the government cannot now be heard to say that it had no knowledge of the presence of these bombs. From the evidence here it would appear that nowhere in Benton County did the government attempt to corral these bombs. The argument of counsel that appellant had no right to enter the premises and seek these harmful objects or warn others of their presence (App. Br. 33) is tantamount to saying that a person has a legal right to drop explosives on the land of another because any corrective action taken would be a forbidden trespass.

Counsel also assume that although only an expert would recognize these as bombs, yet the only duty to clear them rested upon a landowner:

> "especially when he has complete and intelligent control of the consequences of the earlier wrongful act." (App. Br. 33).

It was negligence for the United States to construct this bomb in the manner used. It would be obvious to anyone that a bomb with these characteristics would without question cause injury because of its innocent appearance. There were no markings on the object to warn users even though it didn't resemble a bomb.

Appellant relies upon the Texas City disaster case, *Dalehite v. U. S.*, 346 U. S. 15, 73 S. Ct. 956. It will be noted that this decision was based on the concurrence of only four judges including Mr. Justice Reed, author of the opinion. Three judges dissented and two others did not participate. This disagreement between the majority and dissent was substantial as indicated by Mr. Justice Jackson's language in the minority opinion (73 S. Ct. 975):

> " . . . The civil damage action, prosecuted and adjusted by private initiative . . . is one of the law's most effective inducements to the watchfulness and prudence necessary to avoid calamity from hazardous operations in the midst of an unshielded populace."

The authority of the Dalehite's "discretionary" rule is seriously undermined by a five to four decision in *Indian Towing Co., Inc., v. U. S.*, 76 S. Ct. 122. It will be noted that majority in the *Dalehite* case are now the minority. Mr. Justice Jackson wrote the majority opinion. Following this trend, the court in *Dahlstrom v. U. S.*, (C A 8) 24 L. W. 2312 (Jan. 1956) again questions the "Discretionary" rule.

The liability here would appear to be based upon the "operational level" of governmental activity as defined in the *Indian Towing Co.* case (supra).

The trial judge found that appellant was negligent in

failing to warn persons coming in contact with the bomb, either by markings, signs or other means (R. 13). He further found the government was negligent in dropping this type of bomb especially, in an area outside a target range (R. 14). These findings conform to the evidence and should be sustained.

No claim is made by Appellees that the government was negligent in undertaking the training program, but this immunity was not unlimited license to carry it on in an unreasonable manner.

IV. THE GOVERNMENT'S ACTION WAS THE PROXIMATE CAUSE OF THESE INJURIES.

A. APPELLEE'S INJURIES WERE FORSEEABLE.

Conceivably it can make no difference to the government's responsibility as to whether these bombs were dropped on the Livengood farm, the Coffey farm, or in the Osborne's back yard. By dropping this harmless appearing object on other than a government reservation, a reasonable person would be bound to anticipate that such a situation would occur. By placing this instrument in the hands of civilians it was just a matter of letting nature take its course until someone was injured. The ditch rider was lucky. The bombs he cut up for washers had been exploded. The landowner was also lucky. He had no occasion to use any lead. The lapse of time is insignificant

and cannot logically be used as a cushion for escaping liability.

The rule of forseeability is really a test of the reasonableness of the consequence. The following comments are made in 38 Am. Jur. 706-707:

> "Thus a liability arises if the injurious result of the negligent act was 'such as might probably ensue in the natural and ordinary course of events;' or such as, according to common experience, was likely to result; or such, as, according to common experience and the usual course of events, might reasonably have been anticipated."

> "An injury is deemed the natural and probable result of a negligent act if after the event, the viewing therefrom in retrospect to the act, the injury appears to be the reasonable rather than the extraordinary consequence of the wrong."

> "Even where the test is applied in determining proximate cause, it is weakened, if not made entirely a mere play upon words, by the rule that it is not necessary that the wrongdoer should anticipate the precise injury, and by the rule which attributes to him foresight of the disaster consequent upon his negligence."

B. THE OSBORNES' ACTIONS DO NOT RELIEVE APPELLANT FROM LIABILITY.

There is no evidence to support Counsel's assertion that the removal of the bomb was tortious (App. Br. 37). This imports a wrongful taking from the possession of another, elements not present here.

Where the intervening act is reasonably forseeable, the claim of proximate causation is not broken. In *Eckerson v. Fords Prairie School District No. 11,* 3 Wn. (2d) 475, 101 P. (2d) 345, the negligence of the defendant in leaving a stairway in a dangerous condition subjected it to liability even though the injured party was pushed by the tortious act of another; the court quoting from A.L.I. Restatement 1184:

> " 'If the efforts of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability."

And again from the Restatement page 1202:

> " 'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

In *Swanson v. Gilpin,* 25 Wn. (2d) 147, 169 P. (2d) 356, a pedestrian was struck by a car when crossing the road in front of an illegally parked car. It was held that the pedestrian could recover against the owner of the parked car and the tortious act of the operator of the other car was forseeable and not an intervening cause.

The case of *Cook v. Seidenverg*, 36 Wn. (2d) 256, 217 P. (2d) 799, does not in any way detract from this rule.

See *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 157, 108 Pac. 140, where it was said:

> "The act of an intervening third party, contributing to the injurious result of the original negligence. does not, in all cases, excuse the original wrongdoer. If such intervening act could, or in the exercise of ordinary prudence should, have been foreseen, the original act still remains the proximate cause of the injury . . . "

And also it was held in *Mathis v. Granger Brick and Tile Co.*, 85 Wash. 634, 643, 149 Pac. 3:

> "It would be to eclipse the duty of one who knows of the dangerous character of an agency to control it, by magnifying the innocent failure of another to imagine a danger of which she had no knowledge, into a positive duty to know and avoid it. It would miss entirely the basic principle of the exercise of due care which measures the duty by the magnitude of the danger reasonably to be anticipated by one possessed of the knowledge necessary to foresee it."

C. APPELLEE WAS NOT CONTRIBUTORILY NEGLIGENT.

No amount of argument can serve as a substitute for an examination of the bombs in this case (Ex. 1, 2, 9, 10, 11). As the trial judge observed, he, himself, had been in two world wars and yet the object did not appear dangerous to him (R. 233). Arguably, it would be negligent conduct to treat a bomb as this was handled but this

was a normal way to treat a lead object. No one could hold Appellee negligent without first finding that he knew or had a chance to know the hidden nature of the lead.

CONCLUSION

The trial court heard the testimony and observed the witnesses. He concluded Appellee was entitled to recover. His findings are supported by the evidence and the judgment should be affirmed.

Respectfully submitted,
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